Congressional codification of the role of mitigation banking was built upon a long process of regulatory, scientific and policy acknowledgment of the benefits of commercial mitigation banking. Since the seminal report, *Protecting America's Wetlands: An Action Agenda*, The Final Report of the National Wetlands Policy Forum (The Conservation Foundation, 1988), mitigation banking has been recognized as most appropriate for CWA compensatory mitigation. Indeed, after a comprehensive two-year study, the National Academy of Sciences recently affirmed that mitigation banking offers advantages over traditional mitigation approaches. National Research Council, *Compensating For Wetland Losses Under the Clean Water Act* (National Academy Press 2001) at 160-164.[8]

Federal regulatory agencies have long recognized the importance of mitigation banking in carrying out the purposes of the Section 404 program. As early as 1983, the U.S. Fish and Wildlife Service adopted a policy directive to guide use of mitigation banking, most of which was advanced consolidated mitigation for transportation activities.[9] In 1993 and 1995, the Corps of Engineers and the Environmental Protection Agency concluded that mitigation banking offered substantial advantages,[10] and established

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[8] *See also*, Society of Wetland Scientists, Wetland Mitigation Banking, Position Paper, February 2004, available at http://www.sws.org/wetlandconcerns/banking.html (site last visited January 9, 2006).

[9] U.S. Fish and Wildlife Service, Interim Guidance on Mitigation Banking, ES Instruction Memorandum No. 80 (June 23, 1983).

[10] *See*, Army Corps of Engineers and Environmental Protection Agency *Regulatory Guidance Letter No. 93-2*. "Memorandum to the Field. Subject: Establishment and Use of Wetland Mitigation Banks in

the Clean Water Act Section 404 Regulatory Program," 60 Fed. Reg. 13,711 (Aug. 23, 1993). *See also* The Joint Corps of Engineers and EPA Guidance, 60 Fed. Reg. at 58,607, providing:

Mitigation banks provide greater flexibility to applicants needing to comply with mitigation requirements and can have several advantages over individual mitigation projects, some of which are listed below:

1. It may be more advantageous for maintaining the integrity of the aquatic ecosystem to consolidate compensatory mitigation into a single large parcel or contiguous parcels when ecologically appropriate;

2. Establishment of a mitigation bank can bring together financial resources, planning and scientific expertise not practicable to many project-specific compensatory mitigation proposals. This consolidation of resources can increase the potential for the establishment and long-term management of successful mitigation that maximizes opportunities for contributing to biodiversity and/or watershed function;

3. Use of mitigation banks may reduce permit processing times and provide more cost-effective compensatory mitigation opportunities for projects that qualify;

4. Compensatory mitigation is typically implemented and functioning in advance of project impacts, thereby reducing temporal losses of aquatic functions and uncertainty over whether the mitigation will be successful in offsetting project impacts;

5. Consolidation of compensatory mitigation within a mitigation bank increases the efficiency of limited agency resources in the review and compliance monitoring of mitigation projects, and thus improves the reliability of efforts to restore, create or enhance wetlands for mitigation purposes;

6. The existence of mitigation banks can contribute towards attainment of the goal for no overall net loss of the Nation's wetlands by providing opportunities to compensate for

procedures for the approval and management of mitigation banking. After Congress enacted the 1998 preference for mitigation banks to compensate for impacts from highway projects, the Federal Highway Administration promulgated regulations to govern mitigation banking for interstate and national highway projects.[11] Congress has maintained a consistent oversight of the wetland mitigation industry, investigating and seeking periodic reports from the Congressional Research Service and Government Accounting Office on the progress of compensatory mitigation projects.[12]

Since the early 1990s, mitigation banks have proliferated across the country. The construction of mitigation banks and the offering and sale of credits from those banks are quintessentially interstate commercial activities. The Environmental Protection Agency estimates that mitigation banking has grown from 46 banks in 1992, to 219 banks by the end of 2001, to an estimated more than 450 in 2005.[13] According to Corps of Engineers data, as of 2000,

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authorized impacts when mitigation might not otherwise be appropriate or practicable.

[11] 23 C.F.R. § 777.9. *See also,* Mitigation of Impacts to Wetlands and Natural Habitat, 65 Fed. Reg. 82,913 (Dec. 29, 2000).

[12] *See, e.g.*, Jeffrey Zinn, *Wetland Mitigation Banking: Status and Prospects*, Congressional Research Service, CRS 97-849 (1997); U.S. General Accounting Office, *Wetlands Protection: Assessments Needed to Determine Effectiveness of In-Lieu Fee Mitigation*, GAO-01-325 (May 4, 2001); Jeffrey A. Zinn and Claudia Copeland, *Wetland Issues*, Congressional Research Service, CRS IB97014 (updated June 2, 2005).

[13] Environmental Protection Agency, Mitigation Banking Fact Sheet, available at http://www.epa.gov/owow/wetlands/facts/fact16.html (site last visited January 5, 2006).

there were between 370 and 400 mitigation banks nationwide, in more than 35 states.[14]

Companies in this industry often have mitigation banks or other operations in multiple states.[15] The industries providing other services for compensatory mitigation, such as vegetation and materials for restoration, also are interstate enterprises.[16] While most mitigation banks are located

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[14] *See*, "Existing Wetland Mitigation Bank Inventory", Institute for Water Resources (IWR), U.S. Army Corps of Engineers (Spring 2000), available at: http://www.iwr.usace.army.mil/iwr/regulatory/regulintro.htm#mitbanking (site last visited January 4, 2006). *See also, Banks and Fees: The Status of Off-Site Wetland Mitigation In the United States*, Environmental Law Institute, 2002; *Wetland Mitigation Banking*, Environmental Law Institute, 1993.

[15] For example, EarthMark Companies is an environmental development company based in Florida and is active in mitigation in multiple states in the eastern United States through its affiliate companies in North Carolina (Mid-Atlantic Mitigation, LLC) and West Virginia (EarthMarkWVMitigation, LLC). Current projects are located in Florida, North Carolina, West Virginia and New Jersey. http://www.mitigationbank.com/mitigationbanks.htm (site last visited January 10, 2006) and http://www.earthmark.us/ (site last visited January 10, 2006). Wildlands, Inc., based in California, has mitigation banks and projects in California, Washington and Alaska. http://www.wildlandsinc.com/projectmap.htm (site last visited January 6, 2006). Creative Environmental Solutions, an engineering and environmental science company based in Florida, identifies banks in two states (Florida and Georgia) http://www.creativeenvironmental.com/wetland.asp (site last visited Dec. 21, 2005). Land and Water Resources, Inc., based in Rosemont, Illinois operates banks in Illinois, Colorado and Mississippi. http://www.lawrinc.com/banks.html (site last visited January 10, 2006).

[16] *E.g.*, Huffman & Carpenter, based in Reno, Nevada, provides wetland mitigation (and delineation services) projects in Nevada, California and other states, http://www.nvwetlands.com/comprehensive.html (site last visited December 21, 2005). Envirotech Consultants, a provider of

within and offer credits within one state, some mitigation banks are authorized to operate in multiple states.[17] Indeed, the Environmental Protection Agency has recognized that "entrepreneurial providers of bank credits have emerged as a nationally-organized industry contributing hundreds of millions of dollars annually to the domestic product."[18] With respect to wetland restoration in general, the Fish and Wildlife Service estimated that more than $139 million would be spent in 25 states and one territory by the end of

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wetland nursery services, is involved in projects in Ohio and other states, http://www.envirotechcon.com/services1.html (site last visited Dec. 21, 2005). Applied Ecological Services is a company is based in Wisconsin, with offices in Illinois, Minnesota and Kansas, which provides plant and nursery services to wetland restoration projects in Illinois, Missouri, Kansas and other states. http://www.appliedeco.com/Wetland.cfm (site last visited January 9, 2006). JFNew is an ecological services company providing native plants, wetland restoration and mitigation banking services in multiple states primarily in the Midwest, http://www.jfnew.com/habitat-restore-root.asp (site last visited January 9, 2006). Habitats Native Plant Nursery provides wetland plants in Kentucky and Ohio, http://www.habitatsnursery.org (site last visited January 9, 2006). The Society of Wetlands Scientists maintains a listing of vendors in wetlands services, reflecting a small portion of the national and interstate businesses in wetland restoration and mitigation services, available at http://www.wetlandcert.org/vendor-display.html?rid=90 (site last visited January 9, 2006).

[17] *See, e.g.*, "Existing Wetland Mitigation Bank Inventory," Institute for Water Resources (IWR), U.S. Army Corps of Engineers (Spring 2000), which identifies two banks authorized to operate in both Louisiana and Mississippi, the Delta Land Trust Umbrella Mitigation Bank Agreement and the TL James (umbrella) bank.

[18] EPA, Mitigation Banking Fact Sheet at 3 (Nov. 25, 2005), available at http://www.epa.gov/owow/wetlands/facts/fact16.html. (site last visited January 9, 2006).

Fiscal Year 2004 to restore or protect more than 167,000 acres of wetlands. [19]

In sum, wetland mitigation in general and wetland mitigation banking in particular are interstate commercial activities regulated and encouraged under the CWA, other federal statutes and regulations of multiple federal agencies.

II. APPLICATION OF THE CLEAN WATER ACT TO WETLANDS ADJACENT TO NON-NAVIGABLE WATERS FALLS WITHIN CONGRESSIONAL AUTHORITY TO REGULATE INTERSTATE COMMERCE THROUGH ITS EFFECT ON MITIGATION INDUSTRIES.

For purposes of the arguments presented in this brief, Amicus assumes the following facts, as found by the Court of Appeals: In *Rapanos*, the wetlands were adjacent to non-navigable waters that had some hydrological connection to navigable waters. *United States v. Rapanos*, 376 F.3d 629, 632-33 (6th Cir. 2004). In *Carabell*, the wetlands were separated from non-navigable waters by a man-made berm, allowing no regular hydrological connection. *Carabell v. United States Army Corps of Engineers*, 391 F.3d 704, 705-06 (6th Cir. 2004). For purposes of this brief, both circumstances are referred to as wetlands adjacent to non-navigable waters.

As this Court has reiterated, Congress has authority under the Commerce Clause to regulate in three broad categories: (1) the channels of interstate commerce, (2) the instrumentalities of interstate commerce, and (3) activities

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[19] Jeffrey A. Zinn and Claudia Copeland, *Wetland Issues*, CRS IB97014 (updated June 2, 2005) at 12.

substantially affecting interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995); *United States v. Morrison*, 529 U.S. 598, 617 (2000). If the Court reaches the third, "substantially affecting" branch of the analysis, Amicus submits that regulation of wetlands adjacent to non-navigable waters meets this standard because it impacts a significant form of interstate economic activity based on these wetlands – mitigation banking.

Under *Lopez* and *Morrison*, the Court evaluates four considerations in determining whether conduct "substantially affects" interstate commerce: (1) Is the regulated activity commercial or economic in nature, (2) Is there a jurisdictional element in the statute, (3) Do Congressional findings or legislative history link the regulated activity to interstate commerce, and (4) How attenuated is the link between the regulated activity and interstate commerce.[20] This brief addresses the first and fourth factors.

Amicus submits that the economic activity in these cases, the dredging and filling of wetlands adjacent to non-navigable waters for commercial purposes, substantially affects the interstate commercial activity in the mitigation banking and restoration industries.

A. The Regulated Activity Is Commercial and Economic.

The activity regulated under the CWA is the discharge of fill material into wetlands adjacent to non-navigable waters. A person wishing to undertake such

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[20] The second factor has been described as neither necessary nor sufficient to establish constitutionality. *Morrison*, 529 U.S. at 613. Amicus defers to the briefs of others who will address the CWA legislative history that may be pertinent to the third factor.

activity must first apply for and obtain a permit, which triggers an integrated system of compensatory mitigation for authorized discharges. Congress expressly recognized that discharges under Section 404 involve the commercial activities of mitigation, as reflected in its enactment of a statute that requires the Army Corps of Engineers to promulgate regulations concerning mitigation and mitigation banks (see note 7, above).

The literal language of the statute demonstrates that Congress understood that destruction of wetlands through filling involves commercial activities that may substantially affect interstate commerce. In fact, in Section 404(f), Congress created specific exemptions from the permit requirement for five types of economic activity. 33 U.S.C. § 1344(f)(1)(A)-(E) illustrate the kinds of activities Congress knew were regulated by the CWA. Discharges of dredged or fill material associated with farming, mining, forestry and associated road building – all interstate commercial activities – are exempted from the permit requirement.[21] The statute does not exempt the kinds of discharges of dredged and fill material involved here, which literally would support commercial activity involving a condominium complex and a shopping center.

To find that wetlands adjacent to non-navigable waters are included in the jurisdictional reach of the statute, this Court need find only that Congress could rationally have concluded that the intrastate discharge of dredged or fill material and its compensatory mitigation, taken in the

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[21] Amicus cites Section 404(f) to illustrate Congressional intent to regulate commercial activity, not as illustrative, itself, of the geographic scope of the CWA. *See, Solid Waste Authority of Northern Cook County v. U.S. Army Corps of Engineers ("SWANCC")*, 531 U.S. 159, 171, n. 7 (2001).

aggregate, have a substantial effect on interstate commerce.[22] "[E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial effect on interstate commerce." *Gonzales v. Raich*, 125 S. Ct. 2195, 2205-06 (2005) (*quoting Wickard v. Filburn*, 317 U.S. 111, 125 (1942)). The "substantially affecting" standard often involves aggregation of individual actions that, alone, would not affect interstate commerce. *Lopez*, 514 U.S. at 558-561. The regulated activity here at issue – the dredging and fill of intrastate wetlands and its attendant mitigation – affects interstate commerce in the aggregate.

As this Court stated in *United States v. Riverside Bayview Homes*, 474 U.S. 121, 135 n.9 (1985), "it may well be that not every adjacent wetland is of great importance to the environment of adjoining bodies of water. But the existence of such cases does not seriously undermine the Corps' decision to define all adjacent wetlands as waters." In *Raich*, this Court had "no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA." *Raich*, 125 S. Ct. at 2209. The same is true for the regulation of intrastate wetlands under the CWA.

In certain respects, the Congressional actions regarding mitigation banking reflect a mirror image of the statute at issue in *Raich*. In the CSA, Congress sought to

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[22] "In assessing the scope of Congress' authority under the Commerce Clause, we stress that the task before us is a modest one. We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding." *Raich*, 125 S. Ct. at 2208-09; *see also, Lopez*, 514 U.S. at 557.

extinguish a market; in the CWA and transportation laws, Congress seeks to encourage a market in wetland mitigation banking. In both cases, however, Congress clearly has authority to do so under the Commerce Clause. To conclude that there is no federal jurisdiction over wetlands adjacent to non-navigable waters would have a devastating impact on the mitigation industry and would frustrate Congress's intent to promote this market-based approach to environmental protection. For example, after the *SWANCC* decision, mitigation banks in the Chicago District of the Corps of Engineers lost approximately half of their sales volume and gross income.[23]

B. There is a Direct Link between the Regulated Activities and Interstate Commerce.

The fourth factor in the *Lopez / Morrison* analysis considers the degree of attenuation between the regulated activity and interstate commerce. The Constitution does not tolerate reasoning that would "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567.

The relationship between the discharge of dredged or fill material into intrastate wetlands adjacent to non-navigable waters, compensatory mitigation, and interstate commerce is direct. A robust national market exists in wetlands mitigation banking that would be undermined if the provision at issue here were struck down. Development of the national mitigation banking industry has been encouraged and steered by Congress, through its express preference for use of this market-based mechanism as

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[23] *See*, Royal C. Gardner & Theresa J. Pulley Radwan, What Happens When a Wetland Mitigation Bank Goes Bankrupt?, 35 Envtl. L. Rep. 10590, 10591 n.10 (2005).

compensatory mitigation for highway projects and other authorized CWA discharges. As discussed above, there is robust interstate economic activity in wetland mitigation and mitigation banking.

Several courts of appeals have recognized that the restoration and mitigation industries associated with environmental regulation form an appropriate linkage to interstate commerce. *See United States v. Ho*, 311 F.3d 589, 604 (5th Cir. 2002) ("illicit asbestos removal project likely would reduce the number of companies providing asbestos removal services," and would give Ho a "commercial advantage over conscientious property owners who must pay higher prices for asbestos removal."). *See also*, *United States v. Olin Corp.*, 107 F.3d 1506, 1511 (11th Cir. 1997) ("to the extent a chemical plant can dispose of its waste on-site free of regulation, it would have a market advantage over chemical companies that lack on-site disposal options; Olin's actions, therefore, have an economic character.")

The analysis and conclusions relying upon restoration industries as a basis for federal regulation are similar to determinations that interstate tourism provides a sufficient nexus to wildlife and species protection. *See*, *Gibbs v. Babbitt*, 214 F.3d 483, 492-93 (4th Cir. 2000) ("[t]he relationship between red wolf takings and interstate commerce is quite direct – with no red wolves, there will be no red wolf related tourism . ..."). *See also*, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256 (1964) ("Commerce among the states, we have said, consists of intercourse and traffic between their citizens ... ") (*quoting Hoke v. United States*, 227 U.S. 308, 320 (1913)).

CONCLUSION

Amicus submits that if the Court evaluates the constitutional issues presented in these cases under the "substantially affecting" standard, it should uphold CWA jurisdiction over wetlands adjacent to non-navigable waters based on the substantial effects on the interstate commerce in wetland mitigation banking and restoration.

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IN THE

SUPREME COURT OF THE UNITED STATES

JOHN A. RAPANOS, ET AL.

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondents.

JUNE CARABELL, ET AL.

Petitioners,

v.

U.S. ARMY CORPS OF ENGINEERS, ET AL.

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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BRIEF OF AMICI CURIAE NATIONAL STONE, SAND AND GRAVEL ASSOCIATION, THE AMERICAN ROAD AND TRANSPORTATION BUILDERS, THE CITY OF VICTORVILLE, CALIFORNIA, AND THE NATIONWIDE PUBLIC PROJECTS COALITION IN SUPPORT OF PETITIONERS

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The National Stone, Sand and Gravel Association, the American Road and Transportation Builders Association, the City of Victorville, California, and the Nationwide Public Projects Coalition, as *amici curiae*, respectfully submit this brief in support of Petitioners John A. Rapanos, et al. and June Carabell, et al.[1]

INTERESTS OF THE AMICI CURIAE

The *Amici* are private entities, public sector agencies and associations, and local governments that provide essential services to the public including flood control and water supply management, construction of vital public infrastructure projects and the production of aggregates that are utilized in construction projects across the county.

On a daily basis, *Amici* are forced to navigate the confusing and ever-changing maze of regulations and policy statements issued by the Army Corps of Engineers in order to determine the answer to what should be a simple question: does a given wetland fall under federal jurisdiction pursuant to the Clean Water Act ("CWA")? Under the current framework, determining the answer to this simple inquiry is exceedingly difficult and, even more troubling for *Amici*, often varies depending on in which part of the Country the wetland is located or which particular agency staff member is consulted. *Amici* firmly believe that the time has come for this Court to provide clear criteria for CWA jurisdiction that

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[1] All parties have consented to the filing of this brief. The *Amici* have filed letters of consent with the Clerk. Pursuant to this Court's Rule 37.6, *Amici* state that no counsel for any party in this case authored this brief in whole or in part, and no person or entity other than the *Amici* and their counsel have made a monetary contribution to the preparation and submission of this brief.

recognizes the proper limits of federal jurisdiction over non-navigable waters, and eliminates the inconsistency and lack of clarity that has been the hallmark of this area of the law for far too long.

The *Amici* consist of the following:

The National Stone, Sand and Gravel Association ("NSSGA") is a trade association that represents more than 895 members and approximately 120,000 working men and women in the aggregates and related industries. During 2004 alone, a total of more than 2.86 billion metric tons of aggregate materials (crushed stone, sand, and gravel), valued at more than $16 billion, were produced and sold in the United States. NSSGA's members are responsible for over 90 percent of the annual production of crushed stone and over 70 percent of the annual production of sand and gravel in the United States. Due to how aggregates are formed, sand and gravel are often located near or under streams and other wetlands. Consequently, NSSGA's members frequently excavate materials from these areas. The vast majority of these materials are utilized in public infrastructure projects. NSSGA's members also regularly undertake land reclamation activities that include wetland restoration, creation and enhancement, as well as flood storage enhancement.

The American Road and Transportation Builders Association ("ARTBA"), is made up of more than 5,000 member organizations in the transportation construction industry, including construction contractors, professional engineering firms, federal, state and local transportation administrators, heavy equipment manufacturers, and materials suppliers. These member companies employ more than 2.5 million people in the transportation construction industry in the United States. ARTBA's members are responsible for construction of vital public infrastructure

projects such as highways, bridges, airports, railroads, and mass transit facilities.

The City of Victorville, California has a population of approximately 78,000 and is located approximately 97 miles Northeast of Los Angeles and 35 miles Northeast of San Bernardino at the edge of the Mojave Desert. The Southern California Logistics Airport ("SCLA"), formerly the George Air Force Base, is located in the City and has become the primary focus of the City's development plans. The City is located within the Mojave River Watershed in the high desert region of Southern California. The Mojave River, the primary source of surface water for the basin, is normally dry, except for a small stretch of perennial flow and periods of flow after intense storms. The Mojave River actually flows underground for much of its 120 miles. The City is very concerned that, if the Court upholds the Sixth Circuit's decisions below, normally dry desert washes found in the Mojave River basin that are wet only after intense storms would be considered "Waters of the United States." Such expanded jurisdiction could have a severe impact on the expansion of the SCLA and other development projects, including manufacturing and industrial production, as well as public infrastructure projects that are vital to the City's economic growth and integral to the City's long-term growth plans.

The Nationwide Public Projects Coalition ("NPPC") is a not-for-profit association that is made up of regional and local government agencies that are involved in water supply, flood control, irrigation, wastewater and stormwater management, street and highway construction and maintenance, aggregate mining, and environmental quality amenities. These agencies represent over 12 million constituents, extending from Connecticut to California and from Alaska to Georgia. NPPC works on behalf of members of the public to ensure that vital public infrastructure services

are provided in a safe, timely and environmentally-beneficial fashion. Consisting of public agencies and firms that provide vital infrastructure and services, NPPC's members must ensure that a responsible balance is achieved between environmental, health, and safety goals and the protection of human lives and property. NPPC's members are typified by the following agencies:

The West Valley Water District of Rialto, California ("WVWD") is an independent special district that serves water customers living in southwestern San Bernardino County and northern Riverside County. WVWD depends on local surface water resources, five groundwater basins and the California State Water Project to meet the needs of more than 50,000 persons.

The Metropolitan Denver Water Authority of Littleton, Colorado ("MDWA") is a political subdivision and public corporation of the State of Colorado. MDWA is made up of twenty cities and special districts that provide municipal water and/or wastewater services for the Metropolitan Denver area and serve more than 1.5 million persons. MDWA's member agencies serve some of the fastest-growing counties in the nation.

The Semitropic Water Storage District of Wasco, California ("SWSD") supplies agricultural water for more than 140,000 irrigated acres of growing crops such as alfalfa, cotton, nuts, vegetables, grains and grapes. SWSD operates one of the largest groundwater storage projects in the world, and help meet the drought-year needs of more than 20 million California residents.